82-788

No. .....

Office - Supreme Court, U.S.
FILED
NOV 9 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

D. L. JONES,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

GENE STIPE
Counsel of Record

MITCHELL A. LEE

Stipe, Gossett, Stipe, Harper & Estes
2915 North Lincoln
P. O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for Petitioner

November, 1982

QUESTIONS PRESENTED

1. In a capital case where the crime has as its *mens rea* element a specific intent or special mental element, can the appellate court circumvent the requirements of the Fourteenth Amendment by failure to properly instruct the jury on mitigating defense which would allow the jury to find the accused guilty of a lesser included crime?

2. Whether the manner in which the M'Naghten Rule of Legal Sanity was applied correctly, and in such a manner as to not deprive the petitioner due process of law?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	3
A. Procedural Background of the Case	3
B. Revelant Facts Underlining the Petitioner's Conviction	4
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW	6
REASONS FOR GRANTING THE WRIT	6
I. The Oklahoma Court of Criminal Appeals' decision upholding a criminal conviction where the sentencer was not adequately instructed as to the mitigating circumstances surrounding the offense violates the petitioner's due process and is in conflict with this Court's decisions due to an unconstitutionally restrictive application of the M'Naghten Rule	7
II. The failure of the trial court to give a proper instruction on voluntary intoxication precluded the jury from properly considering intoxication as a mitigating circumstance, and circumvents this Court's prior holdings	12
CONCLUSION	14
APPENDIX A — Opinion of the Court of Criminal Appeals of the State of Oklahoma	1a
APPENDIX B — Petition for Rehearing by Appellant, D. L. Jones	1b
APPENDIX C — Order Denying Petition for Rehearing and Directing the Issuance of Mandate	1c

TABLE OF AUTHORITIES

Cases PAGE(S)

Beshirs v. *State*,
14 Okl.Cr. 578, 174 P. 577 (1918) 10

Biggerstaff v. *State*,
491 P.2d 345 (Okl.Cr. 1971) 10

Eddings v. *Oklahoma*,
..... U.S. ....., 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) 6, 12

Gibson v. *State*,
51 P.2d 891 (Okl.Cr. 1972) 10

Leland v. *Oregon*,
343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) 8

Locket v. *Ohio*,
438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) 6, 12

Miller v. *State*,
567 P.2d 105 (Okl.Cr. 1977) 9

Tucker v. *United States*,
151 U.S. 164, 14 S.Ct. 299, 38 L.Ed. 1193 (1894) 10-11

United States Constitution

Amendment XIV, Section 1 2

Oklahoma Statutes

21 O.S. Section 701.7 (1976) 2
21 O.S. Section 711 2

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1982

D. L. JONES,
Petitioner,

VS.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Petitioner, D. L. Jones, requests that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on July 26, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was published and appears at 648 P.2d 1251 (Okl.Cr. 1982), and appears in Appendix A of this Petition. No opinions were rendered by the trial court.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in order to review a judgment entered on July 26, 1982. A timely Petition for Rehearing was denied by the Court of Criminal Ap-

peals on September 10, 1982. Jurisdiction is invoked under 28 U.S.C. Section 1257(3), petitioner having asserted below and asserting herein, deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The United States Constitution, Amendment XIV, Section 1, provides, in pertinent portion:

> ". . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

2. 21 O.S. Section 701.7 (1976), provides in pertinent portion:

> *Murder in the First Degree.* "(A) A person commits murder in the first degree when he unlawfully and with malice forethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

3. 21 O.S. Section 711 provides, in pertinent portion:

> *Manslaughter in the first degree defined.* "Homicide is manslaughter in the first degree in the following cases:
>
> * * *
>
> 2. When perpetrated without a design to effect death and in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under circumstances as to constitute excusable or justifiable homicide."

STATEMENT OF THE CASE

A. Procedural Background of the Case

Petitioner was charged in an Oklahoma State Trial Court with the crime of murder in the first degree in connection with the homicide of a bar patron.

At the conclusion of the trial, the trial judge instructed the jury on both the crimes of murder in the first degree, and manslaughter in the first degree. The court also instructed the jury on the defense of insanity and intoxication. During the sentencing proceeding, the jurors sentenced the petitioner to death.

On appeal to the Oklahoma Court of Criminal Appeals, the petitioner, among other arguments, urged that the trial court's application of the M'Naghten Rule denied the petitioner due process due to the restrictive application of the M'Naghten Rule. The Oklahoma Court of Criminal Appeals affirmed the petitioner's conviction of first degree murder, and also affirmed the death penalty. A copy of the Oklahoma Court of Criminal Appeals' Order is attached hereto as Appendix A.

The petitioner herein timely petitioned the Court of Criminal Appeals for a rehearing in his case basing such rehearing on a failure to give a proper instruction on voluntary intoxication. A copy of petitioner's Petition for Rehearing in the Oklahoma Court of Criminal Appeals is attached hereto as Appendix B. The Oklahoma Court of Criminal Appeals denied the petitioner's Petition for Rehearing with a copy of said denial attached hereto as Appendix C.

B. Relevant Facts Underlining the Petitioner's Conviction

On March 14, 1979, the petitioner was drinking at the Wichita Lounge in Lawton, Oklahoma. While Petitioner was sitting at the bar, a waitress noticed a gun in the petitioner's boot. The waitress asked the petitioner to cover the pistol with his pants leg, and thereafter, for no apparent reason, pulled the pistol from his boot and shot a woman who had accompanied him to the bar. After shooting the woman the petitioner turned to two parties in the bar, shooting both of them and killing one. As a result, the petitioner was charged with first degree murder.

In defense of his acts, the petitioner raised the defense of temporary insanity. The petitioner raised a defense of unconsciousness. The petitioner's insanity defense, and his unconsciousness defense, were based upon the fact that the petitioner was, at the time of the shooting, taking the prescribed medicine Ativan. On the day of the shooting, the petitioner had voluntarily ingested both the Ativan, and alcoholic beverages. The petitioner presented, in support of his defense, the testimony of two psychiatrists, Dr. Charles Beck and Dr. Lawrence Wharton, who specialize in alcohol and drug addiction problems. The State thereafter presented medical witnesses in rebuttal.

At the close of the trial, the trial court gave an instruction whereby manslaughter was set forth as a lesser included offense to the crime of murder. As is set forth in greater detail hereinafter, that instruction did not mention that the petitioner's state of voluntary intoxication could allow for a manslaughter conviction. The trial court

also gave an instruction whereby the jury was instructed that should the jury find that the petitioner was in such a state of voluntary intoxication as to render his mind incapable of forming or entertaining a specific intent, that the petitioner should be found not guilty of the offense. Once again, this instruction made no mention that the petitioner's state of intoxication could have reduced the crime of murder to the crime of manslaughter.

On appeal, the Oklahoma Court of Criminal Appeals determined that petitioner's conduct fell clearly within the realm of voluntary intoxication, therefore precluding the petitioner's use of the defenses of insanity and unconsciousness as a complete defense. Nonetheless, the Court of Criminal Appeals did note that intoxication could reduce the crime from murder in the first degree to manslaughter in the first degree, provided the intoxication rendered the petitioner incapable of forming a deliberate intent to effect death. The Court of Criminal Appeals also determined that the applicability of the M'Naghten Rule to the petitioner's case was constitutional, and did not violate the petitioner's due process. Without opinion, the Court of Criminal Appeals brushed aside the petitioner's argument in this Petition for Rehearing that the jury was not properly instructed as to the state of voluntary intoxication as a mitigating circumstance sufficient to allow the sentencer to have found the petitioner guilty of the lesser included offense of manslaughter.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Oklahoma Court of Criminal Appeals the petitioner claimed that he was denied due process of law through the unduly restrictive application of the M'Naghten Rule.

2. In the petitioner's Petition for Rehearing in the Court of Criminal Appeals, the petitioner supplemented his argument by claiming that the failure of the trial court to give a proper instruction on voluntary intoxication precluded the jury from considering the intoxication as a mitigating circumstance. While this argument was not couched in terms of this Court's prior holding in *Locket* v. *Ohio* and *Eddings* v. *Oklahoma*, the petitioner clearly raised the failure of the jury to be properly instructed on mitigating circumstances.

REASON FOR GRANTING THE WRIT

In upholding the conviction of the petitioner, the Oklahoma Court of Criminal Appeals disposed of a federal constitutional question in a way which fundamentally misconstrues previous decisions of this Court. The question involves the failure of the trial court to properly instruct the jury on voluntary intoxication as a mitigating circumstance surrounding the offense, thus precluding the sentencer from finding the petitioner guilty of a lesser included offense due to a restrictive application of the M'Naghten Rule.

I. THE OKLAHOMA COURT OF CRIMINAL APPEALS' DECISION UPHOLDING A CRIMINAL CONVICTION WHERE THE SENTENCER WAS NOT ADEQUATELY INSTRUCTED AS TO THE MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSE VIOLATES THE PETITIONER'S DUE PROCESS AND IS IN CONFLICT WITH THIS COURT'S DECISIONS DUE TO AN UNCONSTITUTIONALLY RESTRICTIVE APPLICATION OF THE M'NAGHTEN RULE.

The trial court in this case told the jury in its instruction as regarded manslaughter as follows:

> "You are further instructed that under the facts of this case the crime of murder, is heretofore defined in these instructions embraces a lesser degree of felonious homicide known as first degree manslaughter. In such cases the statute of this state defines homicide as manslaughter in the first degree when perpetrated without a design to effect death, and in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstance as constitutes excusable or justifiable homicide. This category of homicide is also known under the laws as voluntary manslaughter and otherwise defined as the unlawful and intentional killing of another under the influence of a sudden heat of passion caused by adequate provocation, and without malice."

The trial court further instructed, as regards voluntary intoxication:

> "You are instructed that no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; however, if you find and believe that the defendant was in such a state of intoxication

as to render his mind incapable of forming or entertaining this specific intent essential to the offense, he should be found not guilty of said offense."

The petitioner's insanity defense was based upon a cross-reaction between the drug, Ativan, and the alcohol which he had consumed on the day of the events in question. The Oklahoma Court of Criminal Appeals determined, however, that the petitioner's conduct fell within the realm of voluntary intoxication, and that voluntary intoxication, resulting in temporary mania, does not constitute a mental defect or disease required for a valid insanity defense.

The Court of Criminal Appeals therefore decided that the application of the M'Naghten test of criminal responsibility was constitutional insofar as it was applied to petitioner's case as petitioner was allowed to present evidence as to whether he knew the difference between right and wrong at the time of the commission of the acts for which he was charged. In support of the constitutionality of the application of M'Naghten to petitioner's case, the Oklahoma Court of Criminal Appeals cited this Court's decision in *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). The petitioner would submit, however, that even assuming arguendo that the M'Naghten Rule remains constitutional, the unduly restrictive application of the M'Naghten Rule to petitioner's case was wholly in violation of his due process rights. Under M'Naghten the standard is whether or not the accused is able to determine right from wrong at the time of the acts of which he is charged. Nonetheless, in the State of Oklahoma it is entirely possible for an accused to be convicted of the crime of murder

in the first degree even though the accused may not have been able to differentiate between right and wrong at the time of the commission of the offenses. As the Oklahoma Court of Criminal Appeals noted in affirming petitioner's conviction:

> "The settled rule in this jurisdiction is that while voluntary intoxication is not a complete defense to criminal culpability, it may be considered in determining whether the accused possessed the requisite criminal intent during the commission of the crime."

In *Miller* v. *State*, 567 P.2d 105 (Okl.Cr. 1977), we stated:

> "Intoxication would not excuse or mitigate crime unless accused had been so intoxicated that his mental powers had been overcome and it had therefore been impossible for him to form criminal intent. This question of intoxication to the point where the accused is unable to form the requisite intent is a question for the jury on proper instructions from the bench."

In petitioner's case, however, proper instructions were not given as regarded the petitioner's intoxicated condition at the time of the offense charged. As hereinabove mentioned, the trial court gave an instruction on first degree manslaughter. That instruction did not include any reference to voluntary intoxication. The trial court also gave an instruction on voluntary intoxication, but that instruction directed that the jury should find the petitioner herein not guilty of the crime for which he was charged if the jury determined, in fact, that the petitioner was so intoxicated at the time of the acts to be incapable of forming or entertaining the specific intent essential to the offense charged.

The petitioner would submit to this Court that failure to give proper instruction on voluntary intoxication denied the petitioner due process of law in that the jury was never able to properly consider intoxication as a mitigating circumstance. In his Petition for Rehearing filed with the Oklahoma Court of Criminal Appeals, the petitioner herein asserted that the trial court had failed to give a proper instruction on voluntary intoxication and its effect upon the potential for the petitioner to be convicted of the lesser included offense of manslaughter. The petitioner cited to the court the cases of *Beshirs* v. *State*, 14 Okl.Cr. 578, 174 P. 577 (1918) and *Biggerstaff* v. *State*, 491 P.2d 345 (Okl. Cr. 1971) and *Gibson* v. *State*, 51 P.2d 891 (Okl.Cr. 1972). As stated in those cases, the Oklahoma Court of Criminal Appeals has held that the proper instruction to give, when there is evidence of intoxication, is as follows:

> "You are instructed that homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of voluntary intoxication at the time. However, one of the elements of the crime of murder is an intent to effect the death of the person killed and if you find that the defendant at the time of the killing was so completely drunk (intoxicated) as to be totally unable to form an intent to kill, or if you have a reasonable doubt thereof, you should not find the defendant guilty of murder. The homicide, under such circumstances, unless otherwise excusable, would amount to manslaughter in the first degree."

The petitioner would also submit that the failure of the Oklahoma Court of Criminal Appeals, and the trial court, to give such an instruction, contravenes the decision by this Court in *Tucker* v. *United States*, 151 U.S. 164, 14

S.Ct. 299, 38 L.Ed. 1193 (1894). In *Tucker*, the plaintiff-in-error came to this Court claiming error due to the failure of the trial court to give an instruction stating that if the defendant, at the time of the killing, was so drunk as to render the formation of any specific intent to take her life impossible on his part, and before becoming drunk he entertained no malice toward her and no intention to take her life, he could not be convicted of murder. This Court found that the instruction complained of was not erroneous, as the trial court instructed the jury that if the defendant, at the time of the killing, although not insane, was in such a condition of mind, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or do the act that he did do, the grade of his crime would be reduced to manslaughter. This Court determined that the instruction given by the trial court was every bit as favorable to the defendant as that which the defendant requested.

The jury in the case of the petitioner herein was not given such an instruction. As such, the instructions given by the trial court circumvent this Court's holding in *Tucker*.

II. THE FAILURE OF THE TRIAL COURT TO GIVE A PROPER INSTRUCTION ON VOLUNTARY INTOXICATION PRECLUDED THE JURY FROM PROPERLY CONSIDERING INTOXICATION AS A MITIGATING CIRCUMSTANCE, AND CIRCUMVENTS THIS COURT'S PRIOR HOLDINGS.

As hereinbefore discussed, the petitioner's defense to the crime of which he was charged was based upon insanity. The petitioner claimed that the insanity was brought on by a cross-reaction between prescription medication and alcohol which the petitioner had ingested on the day of the acts charged. By failing to properly instruct the jury on voluntary intoxication, however, the jury was improperly precluded from considering the petitioner's intoxication as a mitigating circumstance. Further, that this failure to properly instruct the jury on the mitigating circumstance of intoxication led to the unduly restrictive and unconstitutional application of the M'Naghten Rule in petitioner's case.

While the precise issue of the constitutionality of the M'Naghten Rule's application to petitioner's case, in light of the instructions given on manslaughter and voluntary intoxication, was not clearly couched in terms of a violation of this Court's prior holdings in *Locket* v. *Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and *Eddings* v. *Oklahoma*, ... U.S. ....., 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the issue was brought before the Oklahoma Court of Criminal Appeals in the petitioner's Petition for Rehearing. The Oklahoma Court of Criminal Appeals denied the Petition for Rehearing without opinion. As this Court is well aware, the holding in *Locket and Eddings* mandate

that the circumstances surrounding both the offense and the character and propensities of the offender, are elements to be presented to the sentencer in order that they might consider all of the mitigating circumstances surrounding the offense. In petitioner's case, had the jury been properly instructed that voluntary intoxication could have reduced the petitioner's crime from murder in the first degree to manslaughter in the first degree, it is certainly possible that the jury would not have returned the murder conviction and sentence of death.

The situation presented by the case of the petitioner herein is analogous to *Eddings* in that the voluntary intoxication instruction only allowed the jury to find the defendant either guilty, or not guilty, of the crime of murder. The Oklahoma Court of Criminal Appeals clearly did not consider the issue of voluntary intoxication as a mitigating circumstance in that it applied the pure M'Naghten test to determine whether or not the petitioner herein knew the difference between right and wrong. Thus, the Court of Criminal Appeals and the trial court used an unduly restrictive application of the M'Naghten test, absent a proper voluntary intoxication instruction, which denied the petitioner his due process rights to have the voluntary intoxication considered by the jury as a mitigating circumstance and thus affording the jury the opportunity to convict the petitioner of first degree manslaughter. As the Oklahoma Court of Criminal Appeals has sanctioned the trial court's failure to give a proper instruction on voluntary intoxication, in order that the jury might have considered it as a mitigating circumstance, a Writ of Certiorari should be issued to review the Court of Criminal Appeals judgment.

CONCLUSION

For the failure of the trial court to give a proper instruction on voluntary intoxication and thereby applying an unduly restrictive and unconstitutionally restrictive test under the M'Naghten Rule, the petitioner requests a Writ of Certiorari be granted.

Respectfully submitted,

GENE STIPE
Counsel of Record

MITCHELL A. LEE

Stipe, Gossett, Stipe, Harper & Estes
2915 North Lincoln
P. O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for Petitioner

November, 1982